International Brotherhood of Electrical Workers, Local 98, and Post General Contracting, LLC, d/b/a Post Brothers. Case 04-CC-229379

November 25, 2020

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On May 6, 2020, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent Union and the General Counsel each filed exceptions and a supporting brief, and the Respondent, the General Counsel, and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, except as modified in this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The Respondent Union, International Brotherhood of Electrical Workers, Local 98, its officers, agents, and representatives, shall

1. Cease and desist from:

(a) Threatening, coercing, or restraining Post Brothers or any other person engaged in commerce or in an industry affecting commerce by playing an amplified recording of a crying baby at an excessively loud volume where an object is to force Post Brothers or any other person engaged in interstate commerce or in an industry affecting commerce to cease doing business with Major Electric or any other person engaged in commerce or in an industry affecting commerce.

(b) Threatening any representative of Post Brothers with property damage or other harm where an object is to force Post Brothers to cease doing business with Major Electric.

(c) In any like or related manner violating Section 8(b)(4)(ii)(B) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its business offices and meeting places copies of the attached notice marked as "Appendix".[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with members by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Post Brothers, if they are willing, at all places where their notices to the public and patrons customarily are posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible

[1] The Respondent Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has excepted to the judge's finding that although the audio broadcast played by the Respondent Union at a high volume outside the Charging Party's workplace was unlawfully coercive, the broadcast did not also constitute unlawful picketing under Sec. 8(b)(4)(ii)(B) of the Act. In this connection, the General Counsel urges us to reverse *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797 (2010) and *Sheet Metal Workers Local 15 (Brandon Medical Center),* 356 NLRB 1290 (2011). We find it unnecessary to address the issue of picketing here because we adopt the judge's finding that the audio broadcast was unlawfully coercive, and finding that it was coercive for an additional reason would not materially affect the remedy.

We note that the judge characterized Brian Eddis, the Respondent Union's business agent, as having admitted at trial that he played the audio at issue outside the Charging Party's workplace at a volume that was "very high." According to the record, Eddis said the volume was "high." This inadvertent error does not undermine the judge's findings or his conclusion.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and we shall substitute a new notice to conform to the Order as modified.

[3] If the Respondent Union's office is open to members and employees, the notices must be posted by the Respondent and delivered to the Regional Director for posting by Post Brothers, if it wishes, within 14 days after service by the Region. If the office involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and delivered within 14 days after the office reopens and a substantial complement of members and employees have returned to accessing the office. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its members by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

It is also ordered that the complaint is dismissed as to the allegations not found violative of the Act herein.

Dated, Washington, D.C. November 25, 2020

Marvin E. Kaplan, Member

William J. Emanuel, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten, coerce, or restrain Post Brothers or any other person by playing an amplified recording of a crying baby at an excessively loud volume where an object is to force Post Brothers or any other person to cease doing business with Major Electric or any other person.

WE WILL NOT threaten any representative of Post Brothers with property damage or other harm where an object is to force Post Brothers to cease doing business with Major Electric.

WE WILL NOT, in any like or related manner, violate Section 8(b)(4)(ii)(B) of the Act.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98

The Board's decision can be found at http://www.nlrb.gov/case/04-CC-229379 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Jun S. Bang, Esq., for the General Counsel.

Cassie R. Ehrenberg, Esq., and *William T. Josem, Esq.,* for the Respondent.

Daniel Sobol, Esq., and *Brandon Shemtob, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on February 25–26, 2020, in Philadelphia, Pennsylvania. The complaint, as amended, alleges that Respondent violated Section 8(b)(4)(ii)(B) of the Act by repeatedly broadcasting a recording of a crying baby at a high volume near the entrance of a construction site located at 260 South Broad Street in Philadelphia (the Broad Street site). The work at the site was being performed and supervised by the Charging Party (Post Brothers), the general contractor with whom Respondent did not have a dispute. The Broad Street site included work by Major Electric Systems Inc. (Major Electric), a subcontractor of Post Brothers, with whom Respondent did have a dispute, as well as other neutral subcontractors. The complaint alleges that the above conduct, which was undertaken in connection with peaceful handbilling by several of Respondent's agents, constituted both picketing (para. 6(c) of complaint) and a threat, restraint, or coercion (para. 6(d) of complaint) within the meaning of subsection (ii) of Section 8(b)(4)(B). It is also alleged that one of Respondent's agents made a separate oral threat in violation of subsection (ii). The Respondent denied the essential allegations in the complaint, but admitted that its conduct had a secondary object of causing a cessation of business between Post Brothers and other neutrals and Major Electric, thus presenting the sole issue of whether its conduct was undertaken by unlawful means—that it amounted to

coercion under subsection (ii).[1]

The parties filed post-hearing briefs, which I have read and considered. Based on those briefs and the entire record in the case, including the testimony of the witnesses and my observation of their demeanor, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

It is admitted that Respondent Union is a labor organization within the meaning of Section 2(5) of the Act. Post Brothers is a Pennsylvania limited liability company engaged in the construction of apartment and condominium buildings in the Philadelphia area. Major Electric is a corporation engaged in providing electrical contracting services. It is admitted that Post Brothers and Major Electric are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background and Overview

Post Brothers was gutting and rehabilitating the Atlantic Building, which formerly housed offices, at the Broad Street site in preparation for its future use as residential apartments with commercial space on the first floor. The 23-story building sits on the northwest corner of Broad and Spruce Streets in a mixed residential and commercial use area of Center City Philadelphia. The Wilma Theater is across the street to the east and the Kimmel Center is across the street to the south. On the southeast corner across from the Atlantic building was a vacant lot and next to that lot to the east sits a 30-story residential condominium called Center City One. Spruce Street, which runs east and west, is one way and Broad Street is a very busy thoroughfare running north and south. (See GC Exh. 12.)

For an undetermined number of weekdays, Monday through Friday, from September 17 through October 19, 2018, Respondent engaged in protests against the use of Major Electric by Post Brothers at the Broad Street site.[3] The protest, on the public sidewalk in front of the entrance to the Broad Street site, involved the distribution of handbills and the operation of an amplified recording and broadcast system. At the time, there were other contractors in addition to Major Electric and Post Brothers working at the site. (Tr. 237.) Business Agents John Donohoe and Brian Eddis, admitted agents of Respondent, were in charge of the protest. But other individuals also participated on behalf of Respondent at the site. The handbills, which were distributed by members of Respondent, stated that Post Brothers "polluted the community" by hiring Major Electric, which was accused of not paying fair wages and benefits. The handbills also asked interested parties to contact a named official of Post Brothers to let him know that they did not want Major Electric to "pollute this community." (GC Exh. 7.)[4]

The Crying Baby Recording and the Effects of its Noise Level

The amplified recording system was set up on the sidewalk in front of the entrance to the Atlantic Building construction site on the Broad Street side. It consisted of a recording device connected to two speakers that faced the entrance to the construction site and about 5 feet away from and inside the subway grate that was situated between Broad Street and the sidewalk. The recording was on a repeating loop which consisted mostly of a crying baby as well as a separate voice occasionally stating, "your community is crying for jobs, participation and fair wages." (Jt. Exh. 1, no. 5.) The crying baby portion of the loop lasted some 30 seconds; it was followed by the voice message for 6 seconds and then the crying baby was repeated for another 30 seconds. Then the loop continued repeating itself. (GC Exhs. 3(a) and 8(a).) The speakers were pointed directly in front of the entrance to the Atlantic Building, some 5 feet away from another entrance through which the contractors and employees entered the building. (Tr. 85–88.) The amplified recording of the crying baby was at a high volume and would be playing continuously for about 4 to 6 hours per day. (See GC Exhs. 8(a) and (b) and Tr. 84–89.)

Business Agent Eddis testified that, when the recording was first utilized on September 17, it was set at a "very high volume." The setting was at level 7 of the recording device utilized by Respondent. (Tr. 237–238.) The recording was so loud that it could be heard above the noise of the subway as it traveled below the grate at street level. (Tr. 28,133, 178, GC Exh. 13.) It could also be heard from inside the Atlantic Building where the construction work was being performed, including on some of the top floors. (Tr. 120–121,191–192, 198–201.) There was testimony that, even within 3 feet, someone near the recording equipment had to speak at pretty much a "yelling tone" to be heard over the crying baby. (Tr. 107.) This is confirmed by my own assessment of the video and audio evidence that I heard and viewed during the trial. Indeed, pedestrians passing by the entrance of the Atlantic Building complained and covered their ears as they passed. (See Tr. 49–50, 107, 121–122, 169–173, 264–268, 275–276, 301–304, GC Exhs. 2, 4, 5, 7, 9, and 23.)

The loud noise level at the Broad Street site interfered with activity at the site, as shown by the following credible and uncontradicted testimony. Patrick Steffa, the Post Brothers security official on the scene, mostly testified about the noise level outside the entrance to the Atlantic Building. But he also testified about its loud volume that could be heard on the inside when he entered the building. For example, he could hear the crying

[1] The General Counsel's April 13, 2020 unopposed motion to correct transcript is granted.

[2] The parties entered into a stipulation of facts that was received into evidence as Jt. Exh. 1. The stipulation provides much of the background and includes references to exhibits that were received in evidence with the agreement of the parties. I have relied on that stipulation in setting forth many of the facts in this case.

[3] Although there had been earlier and different protests by Respondent and other unions, the specific protest discussed herein was the only protest at the Broad Street site in September and October of 2018. (Tr. 59–60.)

[4] Respondent's sign-in sheets for the protest indicate that 2 or 3 individuals in addition to Donohoe and Eddis were present at the Broad Street site either handbilling or otherwise aiding Respondent's efforts. The sheets show their presence on September 18, 19, 20, 21, and 24 and October 3, 2018. But these sheets do not accurately reflect all of Respondent's presence at the site. It is admitted, for example, that Respondent was also present at the Broad Street site on October 18 and 19. (Tr. 280–283.)

baby recording from the rest room on the Fifth Floor. (Tr. 120–121.)

Post Brothers Security Guard Brandon Byrd, who was at the Broad Street site for the entirety of Respondent's protest, testified that the noise level was always loud and that he and other guards had to use ear plugs, which did not adequately mute the sound. (Tr. 175–176, 180–181.) Byrd also testified that pedestrians passing by the entrance of the Broad Street site on the public sidewalk covered their ears with their hands as they walked by. This was supported by a photograph of an individual doing what Byrd described. (Tr. 182, GC Exh. 9.) He further testified that the crying baby recording was so loud that he could hear it when, at the end of his workday, he went below street level to take the subway home. (Tr. 177–180, 185–186, GC Exh. 13.)

Vitale Vasilevich, the inventory manager for Post Brothers, was also on site during the entire protest by Respondent. Vasilevich had difficulty, because of the noise level of the recording, in communicating by phone with drivers from neutral employers who were making deliveries to the construction site. At the time, Post Brothers had 2 or 3 major deliveries and 3 to 4 smaller ones per day at the site. (Tr. 193.) Vasilevich testified that, if he was on Broad Street, "it was nearly impossible to hear, understand someone over the phone. Oftentimes, I had to relocate myself to another part of the building or even come around to the back side of the building." (Tr. 193.) Sometimes he was forced to communicate with delivery drivers in person and with hand gestures. (Tr. 194–196.) Finally, he also testified that subcontractors and their employees within the building itself adjusted and relocated their worksites because of the noise level. (Tr. 199–201.)

Neighborhood Complaints Confirm the Loud Noise Level

Four residents of the Center One condominium, diagonally across the street from the Atlantic Building, testified about the loudness of the crying baby recording. All testified that the noise level was very loud and could be heard from inside their apartments, even with double-paned windows and balcony doors closed. They called police to complain, protested to their local government officials, and even went to the Atlantic Building site to complain to Respondent's agents on the scene, all to no avail. Finally, shortly after complaints to a local councilman, the loud recording stopped. That was in mid-October. All of the witnesses were neutral and disinterested (actually some identified themselves as pro-union). Their testimony was mutually corroborative, credible, and reliable.

Retiree Pamela Bona lives on the 22nd Floor, facing north. She described the sound of the crying baby as "horribly blasting" and "very distressing." (Tr. 34–36.) She also heard words with the sound but could not distinguish the words. (Tr. 39–40.) The noise continued over a period of days and weeks for hours per day. She often called the police to complain. Sometimes the volume would diminish when the police came to the scene, but, when the police left, the volume would increase. (Tr. 40–41.) She could also hear the loud noise of the crying baby for blocks away from its source when she did her regular neighborhood walks and errands. (Tr. 51–53.) Bona, who described herself as pro-union, also told Respondent's agents at the protest site that the loud recording hurt their cause. (Tr. 47–49.) On October 18, she contacted her local councilman to complain about the noise and, shortly thereafter, the noise stopped. (Tr. 43–44.)

Adam Klein, a resident on the 25th Floor, confirmed Bona's assessment of the noise level. He described the noise as "very disruptive" and a "constant barrage" in his own home. (Tr. 63.) Klein, another retiree, spends most of his time in his apartment, but, because of the constant noise, he often had to leave to seek relief. (Tr. 64.) He testified that the crying baby recording could be heard hours a day for weeks. (Tr. 65–66.) He also testified that he could hear the recording even above the Broad Street traffic. (Tr. 65.) He would play very loud music to drown out the noise. (Tr. 67.) He also called the police and contacted his councilman. (Tr. 68–70.) Klein further testified that he could hear the recording when walking the neighborhood, blocks away from the Atlantic Building. (Tr. 70–72.)

Howard Paull, a tour guide, testified about hearing the "very, very loud piercing recording on a loop of a crying baby" from the interior of his 11th Floor apartment. He said that the recording went on "for weeks" and for "hours, and hours, and hours" each day. (Tr. 136.) This was with all the windows shut. (Tr. 137.) He occasionally works from home and, on those occasions, "[i]t was like torture." (Tr. 138.) He compared the noise to what the Government reputedly did to torture Panamanian dictator Noriega with "loud, blistering music." (Tr. 140.) Like the others, he heard the noise when he went elsewhere in the neighborhood, blocks away from its source. (Tr. 139–140, 143.) He also contacted his councilman's office. (Tr. 141–142.) He once went to the protest site and talked to John Donohoe complaining about the noise level. Donohoe replied that he had a First Amendment right to protest. Paull replied that that right is limited and "you can't yell fire in a crowded theater." The recording was not lowered after this encounter. (Tr. 145–148.)

Maria Vickers, another resident and a retired lawyer, lives on the Ninth Floor, but facing south, on the opposite side of the Atlantic Building. (Tr. 153–154.) But, even at this distance, she could hear, from the inside of her apartment, what she described as a "screeching noise." (Tr. 155–156.) Like other concerned residents, Vickers talked to John Donohoe on the scene and told him that, as a union supporter, she did not believe that the use of the loud recording was helping Respondent's cause. (Tr. 161–164.)

A City Official Tests the Noise Level

On September 18, because of concern over the noise level of the crying baby recording, representatives of Post Brothers contacted the Civil Affairs Division of the Philadelphia police department and eventually the Air Management Department that handles noise complaints for the City of Philadelphia. (Tr. 89–92.)[5] The Air Management representative who appeared that day was Gary Everly. He took noise readings and engaged in conversations with Patrick Steffa, the Post Brothers representative.[6]

[5] The dates of some of the following events are unclear since the stipulation provides that the first day of the recording was September 17. But the documentary evidence supports the finding, which I make, that the first date that Air Management visited the site was September 18.

[6] Everly returned the next day, September 19, to take additional readings and Steffa seemed to be confused as to which day the above conversations between him and Everly took place. (See Tr. 100, 104.) I find,

The conversations, part of which were recorded and transcribed, make clear that the first noise readings were out of compliance. At one point, Everly admitted that the noise level was "out of compliance," but, in response to Steffa's plea to enforce the noise level requirements, Everly said "I want them to be able to protest." (GC Exh. 3(b).) Steffa was able to see the readings as he followed Everly around and he protested that Everly was not asking that the Respondent turn down the audio level and enforcing the noise ordinance. (See GC Exhs. 3(a) and (b) and Tr. 92–100.) Steffa took a photograph of Everly with a reading device, which was received in evidence along with Steffa's testimony, that showed a reading of 93.7, which was well above normal readings of 60–70 decibels. (Tr. 104–107, GC Exhs. 3(a) and 15.) According to Steffa, during their conversations, Everly assured him that a citation was going to be issued for excessive noise, but, on the next day, when Everly again came to the site, he indicated that a citation would not be issued. (Tr. 113–117.) The findings set forth above are supported by Steffa's credible testimony about the above conversations, much of which was supported by video and documentary evidence. It also was uncontradicted because Everly did not testify.

Eddis testified in general terms about the conversations between Everly and Steffa, but, since he was not directly involved in the conversations, his testimony is not as reliable on the details as Steffa's. Eddis testified that his understanding was that Everly had decided on September 18 not to issue a citation and that Steffa tried to talk him into issuing one. (See Tr. 243–244.) That is not accurate, based on the documentary evidence of that conversation discussed above and the credible testimony of Steffa. Nor did Eddis testify as to the basis of his "understanding," which was speculative in any event. Moreover, as shown below, a subsequent exchange between Eddis and Donohoe confirms that Respondent believed that a citation was forthcoming based on what took place on September 18. In these circumstances, I cannot credit Eddis's testimony in this respect.

Eddis also testified that, on September 18, Everly instructed him to turn down the volume of the recording, which had been set at level 7 on Respondent's machine that day, as it had the day before, to level 4. Eddis testified that he did as instructed. (Tr. 244–245.) Eddis further testified that he kept the volume at level 4 the remainder of the time that Respondent utilized the crying baby recording. (Tr. 245–247.) Donohoe likewise testified he kept the volume at 4 during the entire period of the protest "except once or twice," when he made a "quick adjustment" and "touched it real quick" because a passerby complained. (Tr. 286–287, 292, 298–300.) I do not credit their testimony in this respect for the reasons set forth below.

Credibility

I found both Donohoe and Eddis to be unreliable witnesses, so I generally discredit their testimony unless it constitutes an admission against interest or is corroborated by other reliable evidence. As indicated above, Eddis testified unreliably about whether Everly's reading was in compliance or not. I also found Eddis less than fully forthcoming based on my assessment of his demeanor. Donohoe particularly had an unimpressive demeanor. He was often curt in his answers and demonstrated a unique lack of candor while testifying. I found most significant in evaluating the credibility of both witnesses a text exchange between the two on the night of September 18, which was subpoenaed and came into evidence as GC Exh. 21. As shown below, it contradicts their testimony that they abided by the instructions to turn down the noise level of the crying baby and supports the finding, which I make, that they intentionally turned it up to provoke and interfere with the operations of Post Brothers and other neutrals.

On the night of September 18, Donohoe and Eddis exchanged text messages. It is clear from those exchanges that Eddis believed that Air Management was going to issue a violation citation based on noise level readings from that day at the Broad Street site. It is also clear that Eddis and Donohoe intended to manipulate the location of the speakers to minimize the decibel levels that Air Management was going to test the following day. At one point, Donohoe stated "We did good today. We got to them and that's what we wanted to do. I can just imagine how pissed they were last night w the volume on 7 lol." Eddis responded with his own "Lol!! ["laugh out loud" in textspeak]". He continued: "People were seriously crying…it was way more contentious yesterday…Steffa was not taking it well…along with me going back & forth." Donohoe answered with three thumbs up emojis. (GC Exh 21.) At one point, Eddis stated that he would move the speakers in response to certain actions of Post Brothers. Donohoe stated that the speakers should be positioned "away from building so that the reading across street will be higher and benefit us when they take close reading." (GC Exh. 21.) These exchanges belie the testimony of Donohoe and Eddis concerning the noise level of the recording, its effects and its purposes. It also confirms that Respondent was willing to change the direction of the speakers to avoid adverse readings by Air Management.

In accordance with the above analysis, I also find that the volume was often set well above level 4 and likely at level 7, as it was on the first day of the protest. Further support for that finding is the credible testimony of witnesses Steffa, Byrd and Vasilevich, discussed above. All were regularly present in front of the Broad Street site near the speakers. I also rely on the credible testimony of the residents of the Center City One condominium. They not only testified about the high volume of the noise level, but also that it did not subside even after they complained to Respondent's officials on the scene. Their testimony about the noise level from the inside of their apartments and even when walking in the neighborhood supports the other testimony about the noise level at the source of the crying baby recording and its effect on the neutrals working inside the Atlantic Building. All of this testimony also supports my finding as to the lack of credibility of Donohoe and Eddis to the extent that they denied that the noise level was kept low and never or almost never changed.

It is also clear that the speakers for the recording were almost always facing the entrance of the Broad Street site. My finding in this respect is based in part on the above testimony of Steffa,

after considering all of the evidence, that they took place on September 18.

Vasilevich and Byrd, as well as the photographic evidence demonstrating the placement of the speakers, but also on GC Exh. 21 mentioned above. Indeed, Donohoe admitted as much, testifying that the speakers always faced the Atlantic Building, except "sometimes they were maybe a couple of degrees off on the north/south direction." (Tr. 287.) Significantly, and also adversely reflecting on the credibility of both witnesses, Eddis testified to the contrary, namely, that the direction of the speakers was changed "regularly" for no particular reason. (Tr. 247; See also Tr. 272–273.) Donohoe's testimony about the direction of the speakers is also put in doubt by his statement in GC Exh. 21 that he wanted to position the speakers away from the building in order to affect the noise readings. Based on the above, I also find that Respondent intentionally set the speakers in such a way as to interfere with or even disrupt operations at the Broad Street site. Thus, also considering their general unreliability as witnesses, I reject the self-serving testimony of both Donohoe and Eddis that their intention in using the crying baby recording at a high volume was to attract public attention to their protest.

The Air Pollution Inspection Reports

Two air pollution inspection reports signed by Everly were subpoenaed and received in evidence; they covered noise levels measured on September 18 and 19, 2018.[7] The first, for September 18, was signed on September 21, 2018, and states that readings could not be used for compliance due to weather conditions. The time span for the activity, presumably when Everly was on the scene and doing readings, was listed as from 11 am to 4:30 pm. The second for September 19, was signed on October 18, 2018. That report, which measured activity from 1:30 pm to 3 pm, states that "readings taken on Broad St. where you could not hear source of complaint (a crying baby) were 62.0–68.3 dBA. At entrance to 260 South Broad where you could hear the source sound level readings were 78.5–80 dBA. Because of the increase in background noise from work going on in 260 South Broad sound was less than 10 dBA." (R. Exhs 1 and 2.)[8]

I find that these reports have no reliability in determining the real noise levels in this case. First of all, the reports themselves only cover parts of two days (actually the second and third days) of the crying baby recording, the only times Air Management was on the scene. But the crying baby recording was utilized on many other days from September 17 through October 19. Everly did not testify in this proceeding to explain either the meaning of the readings or the circumstances under which they were taken. This is especially important because the credible testimony of Steffa and consideration of GC Exh. 21, the contemporary exchange between Donohoe and Eddis, casts considerable doubt on Everly's readings. As discussed above, I have found that Everly admitted to Steffa that the noise level on September 18 was out of compliance, but he would not enforce the regulations on that occasion because he wanted Respondent to continue its protest. Indeed, even Donohoe and Eddis expected the readings on that day to show a noise violation. Thus, the noise level was out of compliance on September 18. The official record of that day's readings is not to the contrary since it simply states that accurate readings could not be verified because of the weather.

Moreover, it is admitted that all day on the first day, September 17, when no official readings were taken, the noise level was set at level 7. That was clearly out of compliance because Eddis admitted that, the next day, he was told by Everly to lower the noise level to level 4. As I have found, the noise level was not kept at level 4 throughout the rest of the crying baby protest, contrary to the discredited testimony of Donohoe and Eddis and in accordance with the testimony of many other witnesses. In the last analysis, neither Everly's reports nor the alleged reading of the Respondent's recording machine captured the real noise level of the crying baby and its effects during the lengthy period it was utilized. Based on my credited findings, the noise readings were out of compliance on September 17 and 18. On those occasions, and on many other occasions over the next month, when no official noise level readings were taken, the noise level was loud enough to interfere with the operations of the neutrals at the Broad Street site.[9]

The Alleged Threat

Early in the crying baby protest, Steffa had an exchange with one of Respondent's officials on the scene, Brian Eddis. They spoke near the entrance of the Atlantic Building and over the crying baby recording so the conversation was fairly loud. At first there was an exchange about Steffa being a former union member. (Tr. 107–109.) Then, according to Steffa, Eddis said he "knew where Bridesburg was and that fires happen all the time." (Tr. 109.) At that point the conversation turned "heated." (Tr. 111.) Steffa owns a bar in the Bridesburg section of Philadelphia and he testified there was a fire at a nearby bar the year before. Members of Respondent, including Donohoe, who was Steffa's cousin, frequent Steffa's bar. (Tr. 109–111.) Steffa testified that he felt threatened by Eddis's statement and he increased security by installing cameras at his bar as a result. (Tr. 110–111,128.) Also, according to Steffa, throughout the day, Eddis informed him that, if Major Electric left the location, "the crying baby would leave too." (Tr. 111.)

Eddis admitted having a tense exchange with Steffa at the outset of the protest but denied making the threat related by Steffa. According to Eddis, the exchange took place shortly after the recording equipment was set up. (Tr. 239–242.) At first, Eddis testified that he made reference in the conversation to Steffa's bar and acknowledged that he knew about the bar Steffa owned. (Tr. 239.) Later he testified to the contrary about referring to the bar. (Tr. 241, 242.) Eddis did not refute Steffa's testimony about the recent fire near Steffa's bar. Nor did Eddis deny telling Steffa that, if Major Electric left, so would the recording of the crying baby.

I credit Steffa over Eddis. Steffa's uncontradicted testimony

[7] Air Management did not come to the site on any other days and no readings were taken on the other days of the crying baby recording. (See Tr. 118–119.)

[8] I find it odd that the official report for September 19 was signed a month after the reading, while the one for September 18 was signed 3 days later.

[9] As indicated, I do not rely on the official report for September 19 as an accurate reflection of the noise level on that day. But even assuming it was accurate for the hour and half covered by the report, the noise levels the remainder of that day and other days of the protest were well beyond normal, based on the overwhelming evidence in support of my findings and credibility determinations.

about his interactions with Everly, which was supported by video and photographic evidence, demonstrated his reliability as a witness. His testimony about the Eddis conversation was straightforward and similarly believable, based also on his truthful demeanor. In contrast, Eddis was not a credible witness on a number of other issues, as mentioned above. I did not find his testimony on this issue any more credible, especially in view of his apparent contradictory testimony as shown above and his failure to deny aspects of Steffa's testimony. Accordingly, I credit Steffa's testimony that Eddis did indeed make the threat as related by Steffa.

Discussion and Analysis

The crying baby recording is not picketing

Paragraph 6(c) of the complaint alleges that, by repeatedly broadcasting the crying baby recording at a high volume, Respondent "engaged in picketing" in violation of subsection (ii) of Section 8(b)(4)(B) of the Act. However, it is clear that such conduct does not constitute picketing as a legal matter. In the lead case rejecting an allegation that a union's use of a stationary banner in connection with peaceful handbilling constituted picketing, the Board set forth the following definition of picketing:

> The core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B) is . . . the combination of carrying picket signs and persistent patrolling of the picketers back and forth in front of the entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite. This element of confrontation has long been central to our conception of picketing for the purposes of the Act's prohibitions.

Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.), 355 NLRB 797, 802 (2010).

The use of the crying baby recording in this case, in connection with the peaceful handbilling, is clearly not within the legal definition of picketing set forth above. There was here no use of picket signs and no patrolling and certainly there was no physical or symbolic barrier that sought to prevent (or actually prevented) neutrals from entering the workplace. The General Counsel does not seriously contest either the facts on the crying baby recording or the definition of picketing set forth in the *Eliason* case. Instead, the General Counsel relies on the dissent in *Eliason* to argue a novel and expansive definition of picketing. (GC Br. 32–36.) But I must apply existing Board law. Accordingly, I dismiss the allegation in paragraph 6(c) of the complaint that the crying baby recording constituted picketing in violation of Section 8(b)(4)(B)(ii) of the Act.

The crying baby recording constituted coercion

Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce," who is not involved in a primary dispute with the union, where an object is to force that person "to cease doing business with any other person." Since the secondary "cease doing business" object of Respondent's conduct is admitted here, the main issue on this part of the case is whether the conduct was coercive. In that respect, the Board has found non-picketing conduct to be coercive "when the conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." *Eliason*, cited above, 355 NLRB at 805.

I find that the Respondent's repeated use of the crying baby recording at an excessive volume meets the Board's definition of coercion in *Eliason* and thus violated Section 8(b)(4)(ii)(B) of the Act. See *Carpenter's (Society Hill Towers Owners' Assn.),* 335 NLRB 814, 815, 820–823, 826–829 (2001), enforced, 50 Fed, Appx. 88 (3d Cir. 2002), a case that was cited with approval and distinguished in *Eliason*, 355 NLRB at 806. In *Society Hill*, the recording, which was repeated over a considerable period of time, contained only a worded message explaining the union's dispute. But the message was meant to enmesh a neutral owner of a residential building in the union's dispute with another entity. The evidence of excessive volume included testimony of the residents of the neutral as well as other witnesses. There were also citations of violations of the noise regulations of the City of Philadelphia, but, since those were being appealed at the time of the hearing, they were not relied upon by the administrative law judge or the Board. The Board also relied on a warning system utilized by the union to lessen the volume of the recording when the authorities appeared on the scene to take noise readings, thus interfering with the taking of valid readings.

Contrary to Respondent's attempt to distinguish this case from *Society Hill* (R. Br. 20–21), the facts in this case are remarkably similar to those in *Society Hill*, and, in some ways, present a more serious degree of coercion. For example, here, the crying baby part of the recording was far more disturbing and contained less of a relevant verbal message than the spoken words that made up the entire message in *Society Hill*. As I have found, it had no purpose but to interfere with the neutral employers working at the Broad Street site. Moreover, unlike the situation in *Society Hill*, where the Board did not rely on noise level citations, the noise level here was in violation of the Philadelphia's noise regulations. As I have found, on one occasion, the Air Management representative admitted that the noise level was not in compliance, and, on other occasions, the noise level was at level 7, which was admittedly not in compliance because Respondent had been told that the recording should be turned 3 levels lower. But even apart from those findings, the testimony about the excessive volume of the crying baby recording came from a number of credible witnesses, just as it did in *Society Hill*. And the broadcast here lasted over a lengthy period of time, even though perhaps not as long as in *Society Hill*. Most importantly, the exchange between Donohoe and Eddis, as reflected in GC Exh. 21, as well as my credibility resolutions show that Respondent manipulated the volume of the recording and even the direction of the speakers to avoid proper readings by the authorities, just as the union did in other ways in *Society Hill*. GC Exh. 21 also shows, most disturbingly, an intent to interfere with and disrupt the operations of Post Brothers at the Broad Street site, something that was not the case, at least not in such an explicit way, in *Society Hill*.

Also contrary to Respondent's suggestion (R. Br. 21), there was indeed evidence of the impact of the noise on those working in the Atlantic Building: The credited testimony of Steffa, Byrd and Vasilevich makes such impact quite clear. Nor, contrary to Respondent (R. Br. 21, n. 9), does it make any difference that the Center One residents were not persons engaged in interstate

commerce. They were simply witnesses testifying about the excessive noise level of the crying baby recording. The persons engaged in interstate commerce who were subjected to the coercive noise levels were Post Brothers and the other neutrals—as well as their employees—who were trying to work at the site. That was the essence of the violation.[10]

Respondent's contention (R. Br. 27–30) that the crying baby recording was protected by the First Amendment is without merit. The crying baby aspect of the recording was its most prominent part, eclipsing by far the brief worded message which did not even mention the name of the entity with whom Respondent had its primary dispute. The crying baby part of the recording had no real message and was utilized to interfere with neutrals at the Broad Street site. But what made it coercive was its excessive volume. And the Board made it clear in *Society Hill* that such excessive noise making is not protected by the First Amendment. 335 NLRB at 826, citing and discussing *Kovacs v. Cooper*, 336 U.S. 77 (1949). It is also clear that secondary boycott activity does not have First Amendment or statutory 8(c) protections. See *IBEW Local 501 v. NLRB*, 341 U.S. 694, 703–705 (1951); and *United Brotherhood of Carpenters v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948).

With respect to the First Amendment claim, perhaps Tour Guide and Center City One resident Howard Paull said it best. When Paull complained about the excessive volume of the crying baby recording directly to Business Agent Donohoe at the scene, Donohoe said he had a First Amendment right to play the recording. Paull replied that that right was limited and stated, "you can't yell fire in a crowded theater." Justice Holmes may have said it first,[11] but Paull's rejoinder is the perfect coda for this part of the case, as was Donohoe's failure to lower the volume after Paull's complaint.

Eddis's threat violated the Act

As shown in the factual statement, early on during the crying baby protest, in a conversation at the protest site, Eddis told Steffa that he knew where Steffa's privately owned bar was located and that fires happen there "all the time." There was indeed a recent fire near Steffa's bar and Steffa clearly took this as a serious matter since he thereafter upgraded security at the bar, which was frequented by members of Respondent, including Business Agent Donohoe. This was at least an implied threat of physical harm or harm to the property of a representative of a neutral to the Respondent's dispute at the Broad Street site.

The only remaining question is whether the threat was sufficiently related to the Respondent's admitted secondary objective, namely, to have Steffa's neutral employer, Post Brothers, stop doing business with Major Electric. I find that it was. In context the only explanation for the threat was Steffa's relationship with Post Brothers, a neutral in Respondent's dispute with Major Electric. As the security officer on the scene for Post Brothers, Steffa was objecting to the volume of the crying baby recording and he dealt with Air Management urging that it find a violation of applicable noise regulations. In contrast, Eddis was defending the noise level of the recording. The threat took place very near the crying baby recording, which made speaking above it difficult. And, significantly, later that day, Eddis made clear that the crying baby recording was the source of his displeasure with Steffa by telling Steffa that, if Major Electric left the Broad Street site, the crying baby would leave also. The record contains no other reason for Eddis's displeasure with Steffa on this occasion that would precipitate the threat that was made. Thus, the nexus and connection between the threat and the Respondent's labor dispute is clear. Accordingly, the threat amounted to coercion under subsection (ii) of Section 8(b)(4)(b) of the Act.

Remedy

Having found violations in this case, I shall issue a recommended order that requires Respondent to cease and desist from its unlawful conduct and to post an appropriate notice. As I have found, based on my credibility determinations and the musings of Respondent's agents Donohoe and Eddis in GC Exh. 21, Respondent intentionally used the loud crying baby recording not to call attention to the public about its dispute with Major Electric, but to disrupt and interfere with the operations of Post Brothers and other neutrals in order to force them to cease doing business with Major Electric. Indeed, Donohue testified that Respondent has used the crying baby recording at other locations after the incidents set forth in this case. (Tr. 305–306.) Accordingly, the order will provide that Respondent cease using the recording at an excessive volume not only against Post Brothers but other persons and the cease doing business object should be prohibited insofar as it applies to other persons besides Major Electric. Thus, this is a broad order insofar as it protects persons other than those involved in this case, but it is narrow in that it applies only to the crying baby recording at an excessive volume and prohibits only "like or related" conduct. Such an order is justified solely on the evidence in this case.[12]

Conclusions of Law

By playing an amplified crying baby recording at an excessively loud level in front of the Broad Street site, Respondent coerced Post Brothers and other neutrals working at the site with an object of forcing those entities to cease doing business with Major Electric, thus violating Section 8(b)(4)(ii)(B) of the Act.

By threatening an official of Post Brothers that his personal

[10] All parties in their briefs cited to my decision in *International Brotherhood of Electrical Workers, Local 98 (Fairfield Inn),* 2019 WL 2296952 (May 28, 2019), where I found the Respondent violated Sec. 8(b)(4)(ii)(B) by using a bullhorn at an excessively loud volume elsewhere in the City of Philadelphia. But I do not rely on that decision in support of the violation here because that decision is pending review by the Board.

[11] *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

[12] Both the General Counsel and the Charging Party ask that the notice be mailed to Respondent's members and the Charging Party asks that the notice be read to the members and that Respondent be required to attend training on the Philadelphia noise regulations. I do not think those suggested remedies are necessary. The most effective remedy in this case would be for the Board to expeditiously obtain a court order prohibiting the unlawful conduct, particularly because there was no earlier attempt to obtain an injunction under Sec. 10(l) of the Act.

bar might be subjected to a fire with an object of forcing Post Brothers to cease doing business with Major Electric, Respondent violated Section 8(b)(4)(ii)(B) of the Act.

The above violations constitute unfair labor practices affecting commerce.

The Respondent has not otherwise violated the Act.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[13]

ORDER

Respondent, International Brotherhood of Electrical Workers, Local 98, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening, coercing or restraining Post Brothers or any other person engaged in commerce or in an industry affecting commerce by playing an amplified recording of a crying baby at an excessively loud volume where an object is to force Post Brothers or any other person engaged in interstate commerce or in an industry affecting commerce to cease doing business with Major Electric or any other person engaged in commerce or in an industry affecting commerce.

(b) Threatening any representative of Post Brothers with property damage or other harm where an object is to force Post Brothers to cease doing business with Major Electric.

(c) In any like or related manner violating Section 8(b)(4)(ii)(B) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its business offices and meeting places copies of the attached notices marked as "Appendix".[14] Copies of the notice, on forms provided by the Regional Director of Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicate with members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint is dismissed as to the allegations not found violative of the Act herein.

Dated, Washington, D.C. May 6, 2020

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten, coerce or restrain Post Brothers or any other person by playing an amplified recording of a crying baby at an excessively loud volume where and object is to force Post Brothers or any other person to cease doing business with Major Electric or any other person.

WE WILL NOT threaten any representative of Post Brothers with property damage or other harm where an object is to force Post Brothers to cease doing business with Major Electric.

WE WILL NOT, in any like or related manner, violate Section 8(b)(4)(ii)(B) of the Act.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CC-229379 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[13] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."